BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EFREN B. CAZARES	)	
Claimant	)	
	)	
VS.	)	
	)	
TITAN EMPLOYMENT SERVICES	)	
Respondent	)	Docket No. 1,034,988
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 26, 2007 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant was injured in an accident arising out of and in the course of his employment with respondent on January 11, 2007. The ALJ determined the claimant had met the statutory notice requirements and authorized Dr. John Dickerson to be the treating physician. The ALJ also ordered all outstanding medical bills associated with claimant's care to be paid and ordered temporary total disability to be paid at a rate of $230.57 per week beginning January 24, 2007 until the claimant is released.[1]

The respondent requests review of whether the claimant sustained personal injury arising out of and in the course of his employment and whether notice was timely provided. Respondent also alleges the ALJ exceeded his jurisdiction in ordering respondent to pay claimant's outstanding medical bills.

[1] ALJ Order (Oct. 26, 2007) at 2.

Respondent contends the Order should be reversed because the greater weight of the evidence does not support claimant's claim that he was injured on January 11, 2007 while working for respondent at his assigned work location. Respondent also contends that the claimant did not provide timely notice of any alleged work injury and failed to seek approval to proceed with his back surgery.

Claimant argues that the Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was working through respondent Titan Employment Services as a temporary worker for Snodgrass & Sons, a construction company (Snodgrass). On January 11, 2007 he was cleaning up a work site, moving bundles of what the workers called "shoes" from one place to another.[2] According to claimant these bundles weigh about 50 pounds. While the claimant was picking up these bundles he felt a snap in his low back.

Claimant continued to work but at approximately 10:30 a.m. his supervisor, Carl Hiebsch, noticed claimant limping and asked what was wrong. Claimant testified that he told Carl that "it had been numb for quite awhile now and that, you know, I am not sure it's just not going away."[3] Claimant further testified that Carl then came back later and explained that he had spoken with someone with the employment agency and that they were going to "let me go for the day to see, yeah, to let me go."[4] Although claimant says he worked the next day, for a short time, he did not work for a number of days due to weather. Claimant's last day with Snodgrass was January 19th and on that day he worked only a few hours.

On January 24, 2007, claimant was taken, by ambulance, to the Wesley emergency room where he was given an injection in his back and sent home. A few days later he returned to the emergency room, by ambulance, and was transferred to the Galachia emergency room. In both instances, claimant testified that both his legs were numb and paralyzed. At the second ER visit, claimant had problems with both bowel and bladder incontinence. While at the Galachia ER it was determined that claimant required surgery to address a two level herniation and cauda aquina. Surgery was performed on

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[2] P.H. Trans. at 8.

[3] *Id.* at 11.

[4] *Id.*

January 29, 2007 and after a period of recovery in the hospital, claimant was released to a rehabilitation facility.

Respondent's witnesses recite a somewhat different version of events. Sara Pratt, manager of Titan Employment Services, testified that she first learned of claimant's physical complaints on January 12, 2007 when claimant came to the business office to pick up his check. According to her, claimant had leg pain and was in the process of receiving medical treatment. There was no mention of this problem being work-related. On January 19, 2007, claimant again returned to the respondent's business office to pick up his check. When another office worker commented on his limp, claimant indicated that his leg and foot were both numb. According to Ms. Pratt, claimant was asked whether this was work-related and claimant said "no".

On January 29, 2007, claimant did not appear for work and Ms. Pratt called him to see why. She reached claimant's mother who was upset because her son was in the hospital. Then on February 1, 2007, Ms. Pratt reached claimant directly on his cell phone. During this conversation claimant reported his back injury as work-related.

Carl Hiebsch, claimant's supervisor at Snodgrass, testified that when he first saw claimant on January 11, 2007 he did not see claimant limping. But at about 10:30 a.m. that same morning, he observed claimant limping while he walked. He approached claimant and when asked about the source of his problem, Mr. Hiebsch says claimant stated that he woke up that way. After watching claimant for awhile, Mr. Hiebsch went back to claimant and told him to go home and seek treatment. Claimant and Mr. Hiebsch apparently spoke on the phone the next day and they agreed claimant would remain home to tend to his back.

Over the next few days the weather prevented claimant from working. Then the two decided, on the phone, that claimant would return to work on January 19, 2007. Claimant appeared for work but was only able to work a few hours as he said he had a doctor's appointment. Claimant left the work site and never returned.

The medical records admitted at the preliminary hearing contain only the second hospital admittance. And that record reflects claimant's complaints of "continued . . . low back pain" with complaints of "ongoing sciatic symptoms for the past three weeks and started having significant intractable lumbar pain radiating into the legs right greater than the left."[5]

The ALJ concluded claimant had established that he had suffered an injury arising out of and in the course of his employment with respondent (Titan) on January 11, 2007. He reasoned that it is common for people to try and work through an injury or other serious

[5] *Id.*, Cl. Ex. 1 at 10 (Jan. 29, 2007 hospital report).

medical problems thinking that the problem will improve or that treatment can always be obtained at a later date.[6] He also found that claimant had provided notice to both Carl Hiebsch and Sandra Pratt of his physical problems and that there was "just cause" for any perceived delay in notifying respondent of the work-related nature of his complaints.

After considering the entire record, this Board member finds the ALJ's Order should be reversed. It is uncontroverted that claimant came to work on January 11, 2007 and exhibited no outward symptoms of an injury. And it is equally uncontroverted that he was moving heavy "shoes" and started limping sometime before 10:30 a.m., when his supervisor noticed him having difficulties walking. But two people have testified that claimant denied any connection between these symptoms and work. Even claimant's own testimony is less than clear about what he told his supervisor on the day of the alleged accident. He testified that he told Carl his foot had been numb for about an hour. There is no testimony that claimant explained that he had been lifting the heavy shoes and felt a pop and then the numbness set in. These other witnesses have testified that in each instance, when asked about his problem, he never attributed it to work and even denied such a connection. It was only on February 1, 2007, when claimant was in the hospital recovering from surgery that he began to attribute his problem to the lifting activities of January 11, 2007.

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[7]

In this instance, based upon this record as presently developed, this member of the Board remains unpersuaded that claimant sustained an accidental injury arising out of and in the course of his employment with respondent on January 11, 2007. There is a vast difference in the stories as between claimant and respondent's witnesses and the medical records, while they do not contradict claimant's assertion of the onset of his complaints, they do not support his contention that his symptoms dramatically increased following his lifting event on January 11, 2007. Accordingly, the ALJ's Order is reversed in all respects.

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[6] ALJ Order (Oct. 26, 2007) at 2.

[7] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated October 26, 2007, is reversed in all respects.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

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HONORABLE JULIE A.N. SAMPLE
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[8] K.S.A. 44-534a.